



POLICE DEPARTMENT CITY OF NEW YORK

June 30, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Thomas Guy
Tax Registry No. 950549
Warrant Section
Disciplinary Case No. 2016-16093

Charges and Specifications:

1. Police Officer Thomas Guy, while assigned to the 67th Precinct, on or about and between September 2, 2015, and September 5, 2015, in Kings County, failed and neglected to properly safeguard his service firearm.

P.G. 204-08, Page 2, Paragraph 7 FIREARMS –
GENERAL REGULATIONS UNIFORMS AND EQUIPMENT

Appearances:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
1 Police Plaza
New York, NY 10038

For the Respondent: Roger S. Wareham, Esq.
349 Putnam Avenue
Brooklyn, NY 11216

Hearing Dates:

April 12 & 20, 2017

Decision:

Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on April 12, 2017, and April 20, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Lieutenant Jason Lamitola, and Lieutenant Daniel Sarrubbo as witnesses. Respondent testified on his own behalf. Respondent also called Inspector Joseph Gulotta, Detective Hector DeLeon and Officer Richard Stevens as witnesses. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

Respondent stands charged with failing to properly safeguard his service firearm from September 2, 2015 to September 5, 2015. The following is a summary of the undisputed facts established at trial.

Respondent is a five-year veteran of this Department (T. 104). At the time of the underlying incident, Respondent was assigned to the 67th Precinct's Strategic Enforcement Team ("SET") (T. 105, 135, 137).

On Wednesday, September 2, 2015, at approximately 0930 hours, Respondent reported for duty at the 67th Precinct station house (T. 105; Resp. Ex. H, p. 2). Shortly after that, at or around 1030 hours, Respondent reported to the SET office, located within the station house, where he conducted gang analysis until approximately 1700 hours (*Id.*). Respondent next reported to a Commanding Officer's meeting at approximately 1720 hours (Resp. Ex. H, p. 2).

Following the meeting, Respondent proceeded to the men's locker room located in the basement of the station house (Dept. Ex. 1A, p. 6; Resp. Ex. H, p. 2).

After entering the men's locker room, Respondent changed out of his work clothes, placed his service weapon on the top shelf of his Department locker and then secured the locker using his personal, removable combination lock (T. 105-106, 120-121; Dept. Ex. 1A, p. 6). Respondent next left the men's locker room, signed out of his tour and left the station house at approximately 1805 hours (*Id.*).

Respondent reported for duty the next day, Thursday, September 3, 2015, at approximately 1200 hours (T. 106; Dept. Ex. 1A, p. 6; Resp. Ex. H, p. 2). Sometime thereafter, at or around 1245 hours, Respondent reported to the SET office until the end of his tour at approximately 2035 hours (T. 107, 137-139; Dept. Ex. 1A, pp. 6-7; Resp. Ex. H, p. 2). Respondent testified that he entered his Department locker on at least two occasions during his tour but did not check to see if his service firearm was secured inside (T. 139-140; Dept. Ex. 1A, pp. 6-7).

Respondent was next scheduled to work the J'ouvert detail on Friday, September 4, 2015. On this date, at approximately 1200 hours, Respondent reported for duty (T. 107; Dept. Ex. 1A, pp. 4-7, Resp. Ex. H, p. 3). Shortly after that, Respondent proceeded to the men's locker room to retrieve his service firearm (*Id.*).

While inside the men's locker room, Respondent walked over to his Department locker and used his combination to open the removable lock that secured the locker (*Id.*). Respondent testified that he did not observe any visible signs of damage or evidence of tampering to the locker or removable combination lock (T. 112; Dept. Ex. 1A, pp. 4-5). After he had opened the locker, Respondent proceeded to change into his uniform (*Id.*). Respondent next reached inside

of his locker for his service firearm and tactical holster from the locker's top shelf but discovered that both items were missing (*Id.*). Respondent next secured the locker with his removable combination lock and left the men's locker room in search of his immediate supervisor, Sergeant Habermehl (T. 107; Dept. Ex. 1A, p. 7).

Upon locating Sergeant Habermehl, Respondent reported that his service firearm and tactical holster were missing from his Department locker (*Id.*). Sergeant Habermehl then directed the Respondent to report back to the men's locker room to search for the missing firearm (*Id.*). Respondent conducted the search with negative results (*Id.*). Shortly after that, Respondent, Sergeant Habermehl, and approximately four other officers performed a second search of the outer areas of the men's locker room, but Respondent's firearm was not located (T. 107-108, 159-160).

Notifications were then made to the Internal Affairs Bureau ("IAB"), Group 32, the Crime Scene Unit ("CSU") and the Emergency Services Unit ("ESU") (T. 13, 15; Dept. Ex. 1A, p. 7). IAB Group 32 Investigators, Lieutenant Lamitola¹ and Lieutenant Orecchia, were the first to arrive on the scene. Upon arrival, the two IAB Investigators proceeded to the men's locker room to conduct a visual inspection² of Respondent's locker (T. 15-16). Sometime after that, CSU Detective DeLeon arrived and photographed the scene (T. 62; *see also* Resp. Ex. C-E). DeLeon next dusted Respondent's locker for latent fingerprints but found nothing of value, only smudges, and smears (T. 62-63). He then swabbed Respondent's combination lock in an attempt to collect DNA evidence with negative results (*Id.*).

¹ At the time of the underlying incident, Lieutenant Lamitola was a Sergeant (*Id.*)

² During trial, Lamitola testified that he did not observe any visible signs of damage or evidence to the locker or removable combination lock (T. 17).

DeLeon was advised by Respondent's supervisor, Sergeant Habermehl, that he was able to open Respondent's locker while the padlock was engaged by lifting the handle up and pulling it outward (T. 66, 71). DeLeon performed the same motion and was able to open the locker without disengaging the padlock (*Id.*). DeLeon reported his findings to the two supervisors on the scene before leaving the station house (T. 76-77).

Respondent's service firearm was eventually recovered inside of the station house the following day on Saturday, September 5, 2015. Officer Stevens testified that he found Respondent's service firearm, unsecured, on the top of a locker within the men's locker room (T. 90-94). Stevens added that he initially observed the subject firearm in the same spot on either September 2nd or 3rd but assumed that someone had placed it there temporarily (*Id.*).

Pursuant to the Patrol Guide, all Uniformed Members of Service are required to safeguard their weapons at all times (P.G. 204-08, ¶ 7). The Department Advocate contends that the Respondent violated this requirement to the extent that he was unable to account for his service weapon from approximately 1805 hours on Wednesday, September 2, 2015, until the firearm was recovered on Saturday, September 5, 2015. Respondent maintains that he took reasonable measures to secure his service weapon inside of his Department locker, which he now claims was defective, and further suggests that an unidentified individual improperly removed his firearm from inside of his Department locker sometime between September 2, 2015, and September 4, 2015.

I find Inspector Gulotta, Lieutenant Lamitola, Lieutenant Sarrubo, Detective DeLeon and Police Officer Stevens to be credible witnesses. Each witness testified forthrightly and professionally in a logically consistent manner.

I find Respondent's testimony to be credible, for the most part, based upon his testimonial demeanor and his apparent forthrightness. I do not credit his assertion that he recalled placing his firearm in his locker on September 2nd at the end of his tour. This assertion is more likely based on his habit of leaving his service weapon in his locker rather than an actual recollection of the events of that day. I find that Respondent's testimony on this point was not a deliberate attempt to mislead the Tribunal.

Thus, the decision in this case, turns on the meaning of the word "safeguard," as used in Patrol Guide 204-08. The term, as applied to the context of firearms safety, is neither defined in the Patrol Guide nor in the Firearms and Tactics Section Student Guide. In a case such as this, "we construe a statutory term in accordance with its ordinary or natural meaning" (*FDIC v. Meyer*, 510 U.S. 471, 476 [1994]).

The applicable Patrol Guide provision sets forth several examples of storage options, which do not constitute "safeguarding," including leaving a firearm: (1) unattended motor vehicles; (2) briefcases; (3) handbags; (4) fanny packs; (5) hip packs; (6) tote bags; (7) knapsacks; or, (8) paper bags (P.G. 204-08, ¶¶ 8-9). The dictionary definition of the verb form of the word "safeguard," is "to guard, protect or secure" (Random House Dictionary, 2017).

The Department argues that Respondent's failure to account for his service weapon from September 2nd to September 5th constitutes a violation of the Patrol Guide. This position is tantamount to an accountability standard, as opposed to a misconduct standard; that is, Respondent is guilty of the charged offense because he could not account for his service weapon on September 4, 2015, as evidenced by his reporting of the missing weapon to Sergeant Habermehl. There is no practical difference between that standard and a strict liability standard.

To find an employee guilty of misconduct in an administrative disciplinary proceeding, it is well-settled that there must be some showing of fault on an employee's part, either that he acted willfully or intentionally (*Reisig v. Kirby*, 62 Misc.2d 632, 635 [Sup. Ct. Suffolk Co. 1968], *aff'd*, 31 A.D.2d 1008 [2d Dep't 1969])[“Misconduct and insubordination on the part of a civil service employee implies *intentional* and *willful* disobedience” [emphasis in original]), or carelessly or negligently (*McGinagle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 [1979]; *See also Ryan v. NYS Liquor Auth.*, 273 A.D. 576, 581 [3d Dep't 1948])[“A mere technical breach of the rules without wrongful intent is not sufficient to warrant the discharge of an officer with a record of faithful service”]). As such, because a finding of misconduct requires proof of fault on the part of the employee, employees cannot be held to a strict liability standard in this kind of case (*Dep't of Correction v. Caldwell*, OATH Index No. 2702/14 [May 27, 2015], modified on penalty, Comm'r Dec. [Apr. 19, 2016], appended, modified on penalty, NYC Civ. Serv. Comm'n Case No. 2016-0444 [Feb. 21, 2017]). Specifically, as to the issue presently before this tribunal, prior cases involving the loss of firearms have established that the Department must satisfy its burden of proof and may not establish misconduct under a theory of strict liability theory (*See Department of Correction v. Romola & Simon*, OATH Index Nos. 1899 & 1900/96 [Mar. 31, 1997], *aff'd*, NYC Civ. Serv. Comm'n Item No. CD98-78-A [July 14, 1998]; *Police Department v. Wenz*, OATH Index No. 132/89 [May, 12, 1989])[“[a]ny strict liability standard would be inapplicable in a disciplinary hearing. This tribunal must assess the evidence to determine whether [an officer] acted negligently in safeguarding her weapon”]; *Department of Correction v. Gordon*, OATH Index No. 275/81 [Feb. 3, 1982]).

While all Members of Service are authorized by law to possess firearms as a condition of their employment, no Member of Service is authorized to possess a firearm assigned to another

Member of Service. Utilizing this approach, a Member of Service storing a service weapon in a Department-issued locker, inside a police precinct, should take affirmative steps to ensure that no one except the individual to which it is assigned may access it. Such affirmative steps would include, but are not limited to, placing the weapon inside a locked police station locker when it is not on the police officer's person; securing the locker by closing the locker door, using the locking mechanism attached to the locker door to engage the latch, then affixing a padlock on the handle which can only be unlocked by the Member. Finally, the Member should ensure that once the padlock is affixed to the locker door, that it is indeed secure and cannot be opened without unlocking the padlock.

DeLeon testified credibly that Sergeant Habermehl told him that Respondent's locker could be opened without unlocking the padlock by pulling up and out on the handle. DeLeon tested this assertion and he was successful in opening the locker without unlocking the padlock first. Stevens testified that he observed Respondent's service weapon on top of a locker on either September 2nd or 3rd and saw it in the same place on September 5th. The testimony of these two disinterested witnesses is irreconcilable with Respondent's assertion that he placed his service weapon in his locker and secured it. Accordingly, I find that while Respondent may have believed he placed his service weapon inside his locker on September 2, 2015, and then secured the locker, that he, in fact, left his service weapon on top of his locker on September 2, 2015, and forgot that he had done so. At that point, he was guilty of failure to safeguard his service weapon; whether or not parties unknown moved the service weapon from the top of Respondent's locker to the top of another locker is immaterial. I further find that Respondent's assertion that an unidentified person or persons must have entered his locker and removed his service weapon to be speculative and lacking in probative value.

Based upon a preponderance of the credible evidence in the record, I find Respondent Guilty of the charged misconduct.

PENALTY

The Department has requested the imposition of a penalty of 15 vacation days.

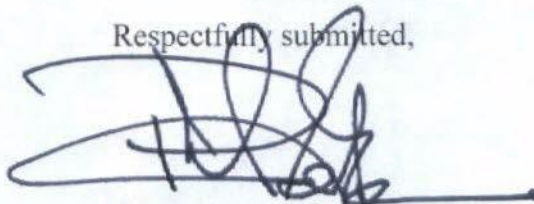
Respondents in previous cases have been sanctioned with the loss of from 10 to 20 vacation days for failure to safeguard a weapon (*Disciplinary Case No. 2016-15745* [May 22, 2017] [Six-year police officer with no prior disciplinary record negotiated a penalty of 10 vacation days for failure to safeguard his firearm. Respondent discovered that the door to his apartment had been forced open and his off-duty weapon had been removed from his bedroom nightstand. No other items of personal property were removed. Respondent reported the incident 15 minutes later to 911; police officers from the 68th Precinct responded and prepared a complaint report. The Evidence Collection Unit responded to the location but was unable to lift any fingerprints. The firearm was recovered almost 18 months later during the execution of a search warrant in the 66th Precinct]; *Disciplinary Case No. 2015-13876* [January 28, 2016] [Fourteen-year police officer with no prior disciplinary recorded negotiated a penalty of ten vacation days for failure to safeguard his firearm. Respondent left the firearm in a locked desk drawer at his home before leaving his residence for the evening. When he returned the next day, he discovered that his front door was unlocked and his rear door was kicked in. Respondent's firearm and a gold chain were missing]; *Disciplinary Case No. 2012-8520* [June 24, 2014] [Twelve-year police officer with one prior adjudication for "rate jumping" negotiated a penalty of ten days for failure to safeguard his off-duty weapon. The firearm was stolen from his dresser drawer during a burglary]; *Disciplinary Case No. 2011-3588* [December 3, 2012] [Eight-year detective, with one prior adjudication, forfeits 20 vacation days for failing to properly safeguard his service firearm. While Respondent asserted that the gun was taken from his secured work locker, the

Department proved that it was more likely than not that Respondent failed to safeguard the gun either by failing to secure his locker or by other means]; *Disciplinary Case No. 2009-85521* [January 12, 2010] [Eight-year police officer with no prior disciplinary record negotiated a penalty of 20 vacation days for failure to safeguard his firearm. Respondent's off-duty firearm was stored in his Department locker and when he went to retrieve it for the annual gun inspection, he stated it was missing. There were no signs of vandalism or damage to the lock or locker]; *Disciplinary Case No. 2009-85517* [January 26, 2010] [Nineteen-year police officer with no prior disciplinary record negotiated a penalty of 20 vacation days for failure to safeguard his off-duty firearm. Respondent could not locate his off-duty firearm for the annual inspection. The weapon was stored in his locker and there was no evidence of the lock being damaged or vandalized]).

In this case, there is no evidence in the record to support a finding that Respondent's weapon ever left the men's locker room or the 67 Precinct stationhouse. While Respondent's carelessness subjected his fellow police officers to an increased risk of harm, the general public was not exposed to the risk of an additional firearm improperly entering the public domain.

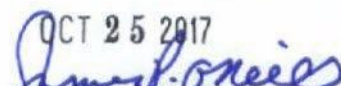
Accordingly, I recommend that the Respondent forfeit ten (10) vacation days.

Respectfully submitted,



Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

OCT 25 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER THOMAS GUY
TAX REGISTRY NO. 950549
DISCIPLINARY CASE NO. 2016-16093

On his last three performance evaluations, Respondent received two overall ratings of 3.5 ("Highly Competent/Competent"), and one overall rating of 3 ("Competent"). He has been awarded five (5) Department medals for Excellent Police Duty and three (3) Department medals for Meritorious Police Duty. [REDACTED]

On January 17, 2017, Respondent was placed on Level I disciplinary monitoring in connection with the charges and specifications filed herein, which remains ongoing.

Respondent has no prior formal disciplinary history.

Paul M. Gamble
Assistant Deputy Commissioner Trials